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In the Supreme Court of the United States

October Term, 1985

(2)

No. 85-1719

DANNY M. OWENS, Individually,
and AMAL INVESTMENTS, INC.,
Petitioners,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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STATEMENT OF THE CASE

Petitioners herein seek review of an order of the Tennessee Supreme Court which denied permission to appeal a judgment of the Tennessee Court of Appeals, Western Division, which affirmed a judgment of the Chancery Court of Shelby County, Tennessee holding Petitioner, Danny M. Owens, individually (hereinafter "Owens"), and AMAL Investments, Inc. (hereinafter "AMAL") liable for certain fines which had been levied against a corporation, Danny's Sandwich Shop, Inc. for violation of the Tennessee Obscenity Law.

Because the chronology of the events and pleadings is important to the application of controlling substantive law, Respondent, State of Tennessee, will recite the order of relevant events in detail. The chronological history of this cause will show the inapplicability of the Extradition Treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland, 28 U.S.T. 227 (hereinafter referred to as the "Treaty"), and that review by this Honorable Court is unnecessary.

On March 31, 1980, Danny Elliott, Sr., sent a charter and form designating himself as a registered agent for Danny's Sandwich Shop, Inc., d/b/a Danny's (hereinafter referred to as "Danny's"), to the Tennessee Secretary of State's Office for filing.

A certified copy of the charter dated April 7, 1980 was sent to Danny Elliott, Sr., who is not a party to this proceeding, from the Secretary of State.

On April 7, 1980, Owens paid $1,000.00 for all outstanding shares of stock in Danny's. It should be noted that this $1,000.00 was the stated minimum amount of

consideration to be paid for Danny's shares prior to its commencing business under the provisions of its charter.

On October 1, 1981, five indictments were returned against Owens, individually, Danny's Sandwich Shop, Inc. and several individuals for violation of T.C.A. §39-6-1104, the Tennessee Obscenity Law.

Thereafter, on February 5, 1982, Owens was indicted on five state assault to murder charges.

On February 4, 1983, Owens was extradited from Great Britain, pursuant to the Treaty, supra, by the State of Tennessee, for the five assault to murder charges, and by the United States Government, for federal firearms violations.

On August 26, 1983, following a criminal trial of the obscenity charges against Danny's Sandwich Shop, Inc., a jury verdict was returned and a $200,000.00 fine was imposed against what the State of Tennessee believed to be a valid corporation.

On October 19, 1983, Owens transferred all of his interest in Danny's to AMAL, another "corporation" wholly owned and controlled by Owens. Owens signed the transfer of assets both as an individual and as president of AMAL. On the same day, Owens executed an identical transfer from Danny's to AMAL executing this document as president of both entities.

On October 21, 1983, Owens, individually, Danny's and AMAL filed a Petition for Temporary Restraining Order requesting that the State be enjoined from executing upon any of the assets of Danny's, alleging that all assets were the property of Owens individually.

On November 8, 1983, the State, having been made aware by this Petition that Danny's Sandwich Shop, Inc.

was a sham corporation with no assets, responded by counterclaiming to pierce the corporate veil, to hold Owens personally liable for the State's judgments against Danny's, for interest on said judgments, to set aside the fraudulent conveyances to AMAL and to enjoin Owens and Danny's from disposing of any property - said counterclaims being compulsory under Rule 13.01 of the Tennessee Rules of Civil Procedure.

On March 15, 1984, the State entered a Nolle Prosequi of the charges against Owens, individually, for violation of T.C.A. §39-6-1104.

Following a two-day trial, on September 12, 1984, Chancellor George Lewis ruled that: (a) the corporate veil of Danny's Sandwich Shop, Inc. should be pierced subjecting Owens to individual liability for the $200,000.00 criminal judgments; (b) the State was entitled to recover interest of 10% per annum on said $200,000.00 from the date of the Criminal Court judgment; (c) Owens was enjoined from transferring, mortgaging or encumbering any property owned or controlled by him until the judgment was satisfied; (d) the fraudulent conveyances from Owens and Danny's Sandwich Shop, Inc. to AMAL were set aside and (e) Owens' application for an injunction was denied.

Owens then appealed, alleging that the Chancery Court lacked jurisdiction to render a judgment against him because he was "protected" by the Treaty and therefore immune from civil judgment. Owens also alleged that the Chancellor erred in awarding interest from the date of the criminal judgments against Danny's Sandwich Shop, Inc.

On August 12, 1985, the Tennessee Court of Appeals for the Western Section at Jackson entered its judgment

in this cause, affirming the lower Court with regard to the inapplicability of the Treaty and reversing as to the interest question, holding that interest was due by Owens, individually, only from the date of entry of the Chancery Court judgment against him individually.

Thereafter, Owens sought permission to appeal the Treaty issue to the Supreme Court of Tennessee. The State filed an Application for Permission to Appeal the interest issue.

On January 21, 1986, an Order of the Supreme Court of Tennessee was entered denying Owens' application to appeal and granting the State's appeal of the interest issue. On May 12, 1986, the Supreme Court of Tennessee affirmed the lower appellate court's ruling on the interest issue by holding that interest was not recoverable on the criminal judgments.

Summarizing these significant developments, Respondent will direct the attention of the Court to the crucial facts. Indictments were returned against Danny Owens, individually, Danny's Sandwich Shop, Inc. and several other individuals alleging violations of T.C.A. 39-6-1104.

Thereafter, Owens was indicted on five state assault to murder charges and shortly afterwards fled the jurisdiction.

Owens was subsequently extradited from Great Britain on both state and federal charges. Although acquitted of the federal charges, he entered a guilty plea to the state assault to murder charges.

Thereafter, Danny's Sandwich Shop, Inc., d/b/a Danny's was tried and convicted and a fine assessed against the corporation in the amount of $200,000.00.

Owens then filed suit against the State seeking an injunction prohibiting the State from executing on any of the assets of Danny's Sandwich Shop, Inc., claiming the assets were his personal property. The State responded by filing a compulsory counterclaim.

After a trial on the merits in the Chancery Court of Shelby County, it was ruled that the corporate veil should be pierced and Owens held personally liable for the debts of the corporation. It was also ruled that post-judgment interest, in the amount allowable pursuant to T.C.A. §47-14-121, should be assessed from the date of the Criminal Court judgment.

Owens then appealed, alleging that the lower court lacked jurisdiction due to the Treaty and that the Court erred in allowing interest to be assessed from the date of the Criminal Court judgment.

The Court of Appeals for the Western Section at Jackson ruled that the Treaty did not afford Owens protection in the case at bar but agreed that under state law interest could not be assessed against Owens personally on a judgment rendered in Criminal Court against his corporation.

Thereafter Owens sought permission to appeal to the Supreme Court of Tennessee with regard to the Treaty question and the State appealed the interest question.

The State Supreme Court denied Owens' application, and granted the State's application on the purely State question of post-judgment interest on a Criminal Court judgment. The Supreme Court of Tennessee subsequently affirmed the lower appellate court's ruling on the interest issue by holding that interest was not recoverable on the criminal judgment.

ARGUMENT

I. THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IS INAPPLICABLE TO THE CASE AT BAR.

The only issue presented for review by the Petitioners is whether the Courts below erred in holding that the trial court had jurisdiction to impose a civil judgment against Owens and had not violated the Treaty by doing so.

The pertinent part of the Treaty is contained in Article XII and reads as follows:

ARTICLE XII

(1) A person extradited shall not be detained or proceeded against in the territory of the requesting party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that party to a third state—

(a) Until after he has returned to the territory of the requested party; or

(b) Until the expiration of the thirty days after he has been free to return to the territory of the requested party.

(2) The provisions of paragraph (1) of this Article shall not apply to offences committed, or matters arising, after extradition. 28 UST at 233.

The law governing extradition has certain well-defined parameters, one of which is referred to as the "Rule of Speciality," a principle of international law that prohibits the requesting country from "prosecuting or punishing the extradited party without the permission of the surrendering country for any offense committed prior to his extradition, except that for which he was extradited." *Berenguer v. Vance*, 473 F.Supp. 1195 (1979). Although Petitioners contend that the State's actions in the case at bar are a violation of this "Rule of Speciality", there are several factors, any of which would preclude application of the "Rule of Specialty" to the case at bar and all of which will be discussed in greater detail in the following sections.

The most compelling of these factors is the fact that the cause of action in the instant case did not accrue to the State until August 26, 1983 when the jury verdict against Danny's Sandwich Shop, Inc. was rendered, thereby creating a debtor-creditor relationship between the State and Danny's Sandwich Shop, Inc. Because this relationship and the subsequent cause of action against Owens did not exist until some nine months after Owens' extradition, the instant case falls squarely within the provisions of Article XII (2) of the Treaty as a matter arising after extradition and as such is specifically exempted from the "Rule of Specialty."

The instant case is also a classic example of an "Implied Waiver" in that the case at bar was instituted, not by the State, but by Owens when he filed his Petition for Temporary Restraining Order on October 21, 1983, and thereby voluntarily submitted himself and this cause of action to the jurisdiction of the Courts below.

The State would show that the great weight of United States and United Kingdom case law supports its contention that the Treaty and "Rule of Specialty" does not protect an individual from service of process in a civil action.

The State would further show that its rights regarding jurisdiction over Owens were in no way enlarged by virtue of his extradition. The State, at all times, could have proceeded against Owens either by way of its Long Arm Statute, T.C.A. §30-2-214, or by an in rem proceeding against his real estate in Tennessee.

A. The Cause of Action in the Case at Bar Did Not Accrue Prior to Owens' Extradition From the United Kingdom and, Thus Does Not Fall Within the Parameters of Article XII of the Treaty.

The cause of action in the instant case did not accrue to the Respondent until August 26, 1983, when a jury verdict was returned against Danny's Sandwich Shop, Inc., d/b/a Danny's, thereby making the State a judgment-creditor of said corporation.

It was not until after Owens filed his petition that the State, pursuant to T.C.A. §40-24-105, proceeded "to collect the criminal fine in any manner a judgment in a civil action may be collected" by filing its petition to pierce the corporate veil. Prior to the rendering of the jury verdict, the State had no monetary claims against Danny's Sandwich, Inc., d/b/a Danny's and even then, the State was unaware that it had any cause of action against Owens for the collection of these newly-obtained claims against the corporation.

Petitioners argue that this action is based upon facts which occurred prior to Owens' extradition, when, in

fact, said cause is based upon a judgment against a corporate defendant and Owens' continuing treatment of said corporation. Petitioners seek to tie the facts of the instant case to the facts of the criminal case, even though they do not pertain to each other.

It should be noted that appearances were made on behalf of the corporation by counsel during the criminal trial and that the State exhibited no intention to pursue Owens, individually, until Owens filed his original petition in the Chancery Court and revealed the fraud he had perpetrated against the State by his operation of the sham corporation and by his stripping of the "corporate" assets immediately following entry of the criminal judgments. The State would show that in fact, Owens could not have been fined individually for a violation of T.C.A. §39-6-1104, because the statute only contains provisions for imprisonment of individuals.

This Court will recognize the long-standing rule that "an action cannot be maintained unless at the time of issuance of the original complaint there be an actual, subsisting cause of action." *Tennessee Jurisprudence,* Vol. 1 p. 165, and the cases cited at Note 20 (also *see Shepard v. Lanier,* 241 S.W.2d 587, 192 Tenn. 608 (1951)).

Black's *Law Dictionary,* Fifth Edition, defines "accrue" as follows:

> Cause of action. A cause of action "accrues" when a suit may be maintained thereon. *Dillon v. Board of Pension Commissioners of City of Los Angeles,* 18 Cal. 2d 427, 116 P.2d 37, 39. Cause of action "accrues", on date that damage is sustained and not date when causes are set in motion which ultimately produce injury. *City of Philadelphia v. Lieberman,* C.C.A. Pa., 112 F2d 424, 428. Date of injury. *Fredericks v.*

Town of Dover, 125 N.J.L. 228, 15 A.2d 784, 787. When actual damage has resulted. *National Lead Co. v. City of New York,* C.C.A. N.Y., 43 F.2d 914, 916. As soon as contract is breached. *Wichita Nat. Bank v. United States Fidelity and Guaranty Co.,* Tex. Civ. App. 147 S.W.2d 295, 297. An action for malpractice against an attorney does not accrue until the client knows or should know of the attorney's error. *Hendrickson v. Sears,* 365 Mass. 83, 310 N.E.2d 131. The point in time at which a cause of action "accrues" is important for purposes of running of statute of limitations.

It is clear from the above-cited authorities that the State of Tennessee could not have maintained an action against Owens individually based on the facts of this case until after the jury verdicts were rendered against Owens' corporation on August 26, 1983.

It is a well-recognized principle of international law that any protection afforded the extradited party by the "principle of specialty" extends only to offenses committed prior to extradition and not to any subsequent offenses. *Berenguer v. Vance,* 473 F.Supp. 1195 (1979); *Shapiro v. Ferrandina,* 478 F.2d 894, 905 (2d Cir.) (Collecting authorities), cert. dismissed, 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed. 2d 133 (1973); 6 M. Whiteman, *Digest of International Law* at 1095, 1100 (1968), 1 Bassiouni, *International Extradition United States Law and Practice* at VII §6-8, §6.1 (1983).

This rule is also expressly stated in the Treaty at Article XII wherein it is said, "The provisions of paragraph (1) of this Article shall not apply to offenses committed, or matters arising, after the extradition." Owens was extradited to the United States on February 4, 1983 and the State of Tennessee's cause of action did not accrue until August 26, 1983, thus placing its cause of action in

this case outside of any protection which might be afforded Owens by way of Article XII or the "Rule of Specialty." This would also apply to the fraudulent conveyances made by and between Owens, Danny's Sandwich Shop, Inc., and AMAL on October 19, 1983.

B. Owens, by Way of His Conduct, Has Waived All Rights He May Have Had Under the Treaty.

The case now before the Court was instituted, not by the State of Tennessee, but by Owens when he filed his Petition for Temporary Restraining Order on October 21, 1983, and thereby voluntarily submitted himself and the cause of action to the jurisdiction of the Court below.

The State of Tennessee first became aware of Owens' abuse of the corporate form at that time and filed its original claim on November 8, 1983,—and then, only by way of a compulsory counterclaim under T.R.C.P. Rule 13.01.

It has long been held that any person claiming a right under an extradition treaty by way of the "Rule of Specialty" may waive the jurisdictional defect and proceed to trial. Thus, it was said:

> The individual in question may, however, waive the application of the principle by consent to be prosecuted for the offense charged in the extradition request. In such a case, it appears that the surrendering state could not claim the doctrine. 1 Bassiouni, *International Extradition United States Law and Practice*, VII §6-8, §6.1.

This principle was also noted by the Court in *United States v. Sobell*, 142 F.Supp. 515 (2d Cir., 1952), when it stated that:

> . . . any question as to the trial court's jurisdiction over his person was voluntarily waived by him . . . 142 F.Supp. at 521.

And, the *Sobell* Court further stated:

> . . . it will be held to have violated the contracted obligations of the Treaty and the Courts will find themselves to be without jurisdiction over the defendant, *unless he waives this issue.* 142 F.Supp. at 524. (Emphasis added.)

The State of Tennessee asserts that by filing his petition and forcing the State of Tennessee to counterclaim, Owens impliedly waived all objections he had to the jurisdiction of the Court. Owens' conduct is a classic example of an implied waiver and falls squarely within the definition found in Black's *Law Dictionary,* Fifth Ed., wherein "Implied Waiver" is defined, in pertinent part as follows:

> A waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or *where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver,* provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby. To make out a case of implied "waiver" of a legal right, there must be a clear, unequivocal and decisive act of the party showing such purpose, or acts amounting to an estoppel on his part *Rosenthal v. New York Life Ins. Co.,* C.C.A. Mo. 99 F.2d 578, 579. (Emphasis added.)

Also, there is the long-settled principle of law that when a party makes an appearance in Court, other than a special appearance, he has waived all objections to the issue of personal jurisdiction. *Baldwin v. Iowa State Traveling Men's Association,* 283 U.S. 522 (1931). In *St. John v. Superior Court,* 178 Cal.App. 2d 794, 3 Cal.Rptr. 535, 84 ALR2d 415, dealing with the immunity from

service of process of a nonresident witness, the Court held:

> Our courts have consistently recognized an exception to the granting of immunity in those cases where the second action, in which immunity is claimed, 'arises out of or involves the same subject matter as one in which the nonresident has made a voluntary appearance.' *Von Kesler v. Superior Court,* 109 Cal. App. 89, 292 P. 544; *Slosberg v. Municipal Court,* 101 Cal.App.2d 238, 225 P2d 312; *Velkov v. Superior Court,* 40 Cal.2d 289, 253 P2d 25, 35 ALR2d 1348."

The instant case indeed arises out of and involves the same subject matter as the original petition which was filed by Owens and AMAL. Thus, Owens has waived his right to assert any objection he may have had to jurisdiction.

C. The Extradition Treaty Does Not Protect Against Civil Suit.

The Treaty deals exclusively with criminal offenses not civil actions. Each and every "offense" listed in the Treaty is a *criminal* offense. And, in Black's *Law Dictionary,* Fifth Edition, "offense" is defined as:

> A Felony or misdemeanor, a breach of the *criminal laws.* The word "offense," while sometimes used in various senses, generally implies a felony or a misdemeanor infringing public as distinguished from mere private rights, punishable under the criminal laws . . . (Emphasis added.)

This definition of "offense" was adopted by this Honorable Court in *U. S. v. Rauscher,* 119 U.S. 407, 7 S.Ct. 234 (1886).

In *Rauscher,* the defendant was indicted for cruel and unusual punishment on the high seas, but was extradited

from Great Britain, under a treaty dated August 9, 1842, on a charge of murder on the high seas. The defendant objected that this was not the offense for which he was extradicted and he, therefore, should be freed.

This Court, after a review of the history of extradition, formulated the "Rule of Specialty" to cover such circumstances. Throughout its opinion, this Court not only limited the term "offense" to a criminal context; but, it expressly refused to extend the "Rule of Specialty" to civil cases. Thus, the Court stated:

> *The difference between serving process in a civil action* . . . whether arrest be an incident to that process or not, *and the indictment and prosecution of a person similarly situated for a crime not mentioned in the treaty of extradition under which the defendant was by force brought to this country, is too obvious to need comment. And while it is unnecessary to decide now whether he could be so served with process in civil proceedings,* it does not follow that he would be equally liable to arrest, trial, and conviction for a crime . . ." *U. S. v. Rauscher,* 119 U. S. at 427. (Emphasis added.)

The "Rule of Specialty" was again considered in the case of *Fiocconi v. Attorney General of The United States,* 462 F.2d 475 (2d Cir., 1972). In *Fiocconi,* the defendants were extradicted from Italy on charges of conspiracy to import heroin. Although crimes involving narcotics were not among those listed in the Extradition Convention between the two governments (15 Stat. 629 (1868)), they were extradicted to the State of Massachusetts pursuant to the principle of comity.

Thereafter, while the defendants were out on bail, they were indicted on charges in New York; and, the defendants, being unable to post bail, were confined.

The *Fiocconi* Court, in considering whether such action was a violation of the "Rule of Specialty", stated:

> That extradition is a matter of treaty or of comity between governments; that a breach of faith by the receiving government entails international consequences; but that the *treaty or practice confers no rights on persons who have been so extradited unless this has been spelled out.* (Citing as an example the French Treaty considered in *United States ex rel. Donnelly v. Mulligan,* 74 F.2d 220, 221 (2d Cir. 1934)). 462 F.2d at 478. (Emphasis added.)

The treaty with which the Court is concerned in the case at bar contains no reference to, and does not concern itself with, civil actions. Although Petitioners argue that absolute immunity from civil actions is also conferred upon the relator, this is not the case as was aptly noted by the Court in *Fiocconi,* wherein it was said:

> If the countries had intended that the requesting government could not try the accused for any crime committed before the time of his surrender other than the crime for which he was extradited, *they could have accomplished this by adopting one of the standard clauses to that end.* (See 1 J. Moore, Extradition §§148-49, at 194-96 (1891)). 462 F.2d at 481. (Emphasis added.)

The State of Tennessee would agree with the Judge Friendly's holding in *Fiocconi,* to wit: if the United States and the United Kingdom had intended for the treaty to grant immunity from civil actions, they would have included such a standard clause in the treaty. The State of Tennessee would show that such clauses have been in use since at least January 6, 1909, when the United States and France entered into an extradition treaty which states, at Article VII, as follows:

> No person surrendered by either of the High contracting Parties to the other shall be triable or tried or be punished for any crime or offense committed prior to his extradition, other than the offense for which he was delivered up, *nor shall such person be arrested or detained on civil process for cause accrued before extradition,* unless he has been at liberty for one month after having been tried, to leave the country, or, in case of conviction, for one month after having suffered his punishment or having been pardoned. 37 Stat. 1531. (Emphasis added.)

Petitioners also cite the cases of *In Re Baruch,* 41 F. 472 (1890) and *In Re Reinitz,* 39 F. 204 (1889) to support their assertion that the "Rule of Specialty" is applicable to civil proceedings when, in fact, both cases dealt solely with the issue of civil *arrest.*

In *In Re Baruch, supra,* the defendant was brought to New York State from the state of New Jersey under a warrant issued by a commissioner of the Court, which was based upon the petition of the Austria-Hungarian Consul to procure the extradition of the defendant from the United States to Austria on a charge of embezzlement of public funds of the Austria-Hungarian Empire. After the defendant had remained in jail for approximately one year, it appeared to the Court that the charge of embezzlement could not be sustained, whereupon the extradition proceedings were discontinued and the defendant was discharged. The defendant was immediately arrested upon his discharge on an Order of Arrest issued in a civil suit based on conversion of the same funds which the defendant had been accused of embezzling in the extradition proceedings.

The prisoner petitioned the U. S. District Court on a Writ of Habeas Corpus and Certiorari claiming a violation

of the "Rule of Specialty." The District Court concluded that the prisoner was not subject to civil arrest in the state of New York and had the prisoner removed to the state of New Jersey.

Some six months earlier, the same District Court had decided *In Re Reinitz, supra,* in which the prisoner had been extradited from Ireland to United States on a charge of forgery. Upon his being acquitted and released on the charge contained in the extradition warrant, the prisoner was immediately arrested in a civil action for conversion.

The Court, refusing to make a distinction between an arrest in a criminal action and in a civil action, stated that, "No reasons are perceived why the limitations of the treaty . . . are not applicable to a *civil arrest* as to a criminal one." *In Re Reinitz,* 39 F. at 207. (Emphasis added.)

The distinction between civil arrest and service of process in a civil action is illustrated by Black's *Law Dictionary,* Fifth Edition, wherein "service of process" is defined as follows:

> The service of writs, summonses, signifies the delivering to or leaving them with the party to whom or with whom they ought to be delivered or left. . .

While "civil arrest" is defined as follows:

> The *apprehension* of a person by virtue of a lawful authority to answer the demand against him in a civil action . . . (Emphasis added.)

And, the term "apprehension" is defined as follows:

> The seizure, taking, or arrest of a person on a criminal charge.
>
> Civil law. A physical or corporal act (corpus), on the part of one who intends to acquire possession

of a thing, by which he brings himself into such a relation to the thing that he may subject it to his exclusive control.

Although *Reinitz* and *Baruch* are in direct conflict with the majority of case law and authorities (See e.g. *Adriance v. Lagrave* (1874), 59 NY 110, 17 Am Rep 317, Reug 1 Hun 689, *Martin v. Woodhall* (1889), 24 Jones and S 439, 4 NYS 539 (which would allow even civil arrests), *Caldwell,* 8 Blatchf. 131, *Allen v. Dykers,* 3 Hill 539, 597, *Childs v. Smith,* 55 Barb. 45, 53, *Rich v. Husson,* 1 Duel. 617, 621, *Billings v. Baker,* 28 Barb. 343, *Clarke on Extradition,* 2d Ed. p. 90, *Moore on Extradition,* Vol. 1, 270, 740-741, and the English case of *Pooley v. Whetham* (1880, Eng.), LR 15 Ch. Div. 435 (which allows process in a civil action)), the Court is not plagued with the question of "civil arrest" in the instant case.

In the case at bar, service of process was accomplished on Owens by way of a compulsory counterclaim under Rule 13.01 of the Tennessee Rules of Civil Procedure. Owens was not arrested nor was he deprived of his liberty in any way as a result of these civil proceedings.

Thus, the critical factor, deprivation of liberty, according to *Reinitz* and *Baruch* needed to invoke the "Rule of Specialty" is not present in these proceedings.

It is a well-settled principle of law in Tennessee that a defendant appearing in the state under legal compulsion, as in the instant case, is not immune to service of process in a civil action unless said criminal process is a mere ruse, pretext or is instituted in bad faith for the bare purpose of getting the defendant into the jurisdiction in order to serve him with such civil process. *Anderson v. Atkins* (1930), 161 Tenn. 137, 29 S.W.2d 248, *McNabb v. Lynn* (1937), 171 Tenn. 8, 120 S.W.2d 3, *Broaddus v.*

Patrick (1941), 177 Tenn. 335, 149 S.W.2d 71. This would appear to be the rule in cases concerning international extradition as well. (*See* e.g. Hackworth, *Digest of International Law*, Vol. IV, Department of State, Publication #1756.)

In the case at bar, Owens was extradited on federal firearms charges and interstate shipment of stolen property (he was subsequently acquitted on these charges), as well as five state charges of assault to murder, to which Owens later plead guilty. These circumstances, coupled with the fact that these proceedings were initiated by Owens, completely foreclose any argument by Owens that his extradition from the United Kingdom was instituted in bad faith or for the bare purpose of bringing him into the jurisdiction of the Court to be served with civil process.

The inapplicability of the "Rule of Specialty" to the case at bar is further illustrated by the practice of the Courts in determining if a proceeding is in violation of said rule.

Thus, it was said, in the case of *Fiocconi v. Attorney General of The United States*, 462 F.2d at 480 (2d Cir., 1972), that:

> . . . The *Rauscher* remedy must be applied in light of the considerations that give it birth. Since the object of the rule was to prevent the United States from violating international obligations, *it becomes essential to determine* as best one can, *whether the surrendering state would regard the prosecution at issue as a breach.* In *Rauscher*, this was altogether clear . . . (Emphasis added.)

And, in *U. S. v. Jeter*, 722 F.2d at 373 (8th Cir., 1983), it was said:

> In determining whether the principle has been abrogated in a given instance, the Circuit Courts have inquired "whether the surrendering state would regard the prosecution at issue as a breach." *See* e.g., id.; *United States v. Paroutian,* 299 F.2d 486, 491 (2d Cir., 1962).

In the case at bar, the law of the surrendering state, the United Kingdom, is well settled with regard to the inapplicability of the "Rule of Specialty" to civil proceedings. In the leading case of *Pooley v. Whetham* (1880, Eng.) LR 15 Ch. D. 435, Pooley was extradited from France for violations of the bankruptcy laws. Pooley was subsequently acquitted of violations of the bankruptcy laws and was thereafter brought to trial on civil charges, wherein he claimed immunity by way of the "Rule of Specialty."

Although faced with similar provisions with regard to the term "offense" as those found in the case at bar (*Pooley v. Whetham, supra*), the Court held Pooley subject to civil process. Thus, the United Kingdom would not consider civil proceedings such as those in the instant case to be a violation of the "Rule of Specialty' nor would it consider these proceedings to be a breach of faith.

D. There Was No Enlargement of the State of Tennessee's Rights in the Instant Case by Virtue of Owens' Extradition.

The Tennessee Court of Appeals for the Western Section at Jackson correctly interpreted the intent of the parties to the Treaty to be that the Treaty shall not be used to gain an advantage that would not otherwise be available to the prosecuting party. This is simply a restatement of the good faith test which was applied in the

cases of *In Re Baruch,* 41 F. 472 (1890) and *In Re Reinitz,* 39 F. 204 (1889).

Both *In Re Baruch, supra,* and *In Re Reinitz, supra,* were decided on the fact that the extradition process was used in order to obtain jurisdiction over the defendant. In other words, the process was used for the sole purpose of expanding the rights of the prosecuting party.

The Tennessee Court of Appeals, in determining the rationale for the rule of specialty, relied in part on M. Cherif Bassiouni, *International Extradition and World Public Order,* p. 353, 1974, wherein it is said, in part:

> The rationale for the doctrine rests on the following factors:
>
> * * *
>
> (2) The requesting state did not have in personam jurisdiction over the relator, if not for the requested state's surrender of that person.

The State of Tennessee would agree with the Tennessee Court of Appeals in that any and all proceedings in this cause could have been accomplished, either by way of the Long Arm Statute, T.C.A. §30-2-214, or by an in rem proceeding, even if Owens had remained in the United Kingdom. Owens could have still initiated this action by filing his complaint and the State of Tennessee would have still been compelled, under T.R.C.P. 13.01, to file its counterclaim.

Thus, the State of Tennessee gained no advantage whatsoever by way of Owens' extradition.

The Petitioners argue that we must deal with what actually happened and not what could have happened; and, yet they seek to have this Honorable Court apply this rationale without regard to the intention of the parties to

the Treaty or to the events as they actually occurred. They totally ignore the fact that Owens voluntarily submitted himself to the jurisdiction of the Court.

The Tennessee Court of Appeals was also correct in applying the long-standing test of whether the surrendering state would consider the action at issue as a breach of the Treaty. Said test is set out in *Fiocconi v. Attorney General of The United States,* 462 F.2d at 480 (2d Cir., 1971), wherein it is said that:

> . . . The *Rauscher* remedy must be applied in light of the considerations that gave it birth. *Since the object of the rule was to prevent the United States from violating international obligations, it becomes essential to determine as best one can, whether the surrendering state would regard the prosecution at issue as a breach.* (Emphasis added.)

And, in *U. S. v. Jeter,* 722 F.2d at 373 (8th Cir., 1983), wherein it was said:

> In determining whether the principle has been abrogated in a given instance, the Circuit Courts have inquired *"whether the surrendering state would regard the prosecution at issue as a breach."* *See* e.g., id.; *United States v. Paroution,* 299 F.2d 486, 491 2d Cir. 1962). (Emphasis added.)

As was discussed *supra,* the surrendering state in the case at bar, the United Kingdom, would not consider this civil proceeding against Owens to be a violation of the Treaty. *See* e.g., *Pooley v. Whetham* (1880), LR 15 Ch. D. 435. Thus, the Treaty is inapplicable and review by this Court is unnecessary.

CONCLUSION

The State of Tennessee requests that this Honorable Court deny review of this issue because there has been no violation of the Treaty; and, in fact, the Treaty is inapplicable to the case at bar for the following reasons: (a) the cause of action in the instant case arose subsequent to the extradition; (b) Owens, by his conduct, waived all rights he may have had under the Treaty; (c) the Treaty does not protect against civil suit; and (d) there was no enlargement of the State's rights by virtue of the extradition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on this 20th day of May, 1986, I have served the foregoing brief in opposition to Petition for Writ of Certiorari on the Petitioners by mailing three copies of same, postage prepaid, to Robert G. Gilder and Arch Boyd, 217 Exchange, Memphis, Tennessee 38105, counsel for petitioners.

JAMES EDWARD MULLIKIN
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SUPPLEMENTAL APPENDIX

(Filed May 12, 1986)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

Shelby Equity No. 2
(Court of Appeals No. 40)

Judgment of Court of Appeals
Affirmed; Case Remanded

DANNY M. OWENS, ET AL,
Plaintiffs/Appellees,

v.

STATE OF TENNESSEE,
Defendant/Appellant.

JUDGMENT

This cause coming on to be heard upon the proceedings from the Court of Appeals, Western Section at Jackson, application for permission to appeal having been heretofore granted, brief of the appellant; upon consideration whereof, this Court is of opinion that the judgment of the Court of Appeals should be affirmed and the cause should be remanded for the reasons set out in the opinion filed (a copy of which is attached hereto).

IT IS, THEREFORE, ORDERED AND ADJUDGED that the judgment of the Court of Appeals is affirmed and the cause is remanded to the trial court for any further proceedings which may be necessary.

Costs incident to the appeal in this Court are taxed to the State. All other costs will remain as assessed by the Court of Appeals, for which let execution issue, if necessary.

5/12/86.